

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

FOOD CONCEPTS INTERNATIONAL,  
L.P., a Texas limited  
partnership,

NO. CV-10-0342-LRS

Plaintiff,

v.

DEFAULT JUDGMENT

MEX, INC. dba ABUELO'S FINE  
MEXICAN DINING, a Washington  
corporation, and its AGENTS,

Defendants.

BEFORE THE COURT, without oral argument, is Plaintiff Food Concepts International, L.P.'s Motion for Entry of Default Judgment against Defendant Mex, Inc. dba Abuelo's Fine Mexican Dining and its Agents, which was filed January 14, 2011. (Ct. Rec. 7.) Federal Rule of Civil Procedure 55(b)(2) governs applications to the court for entry of default judgment. Upon entry of default, the complaint's factual allegations regarding liability are taken as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir.1987). After considering Plaintiff's motion and the records and files herein, the Court hereby finds:

1. An Order granting default was entered by the Clerk of the Court against Defendant MEX, INC. and in favor of Plaintiff on November 30, 2010. (Ct. Rec. 6.)

1           2. Granting or denying default judgment is within the court's sound  
2 discretion. *Draper v. Coombs*, 792 F.2d 915, 924-25 (9th Cir.1986); *Aldabe*  
3 *v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir.1980).

4           3. In light of the entry of default against defendant, there is no  
5 apparent possibility of a dispute concerning the material facts  
6 underlying the action. There is no indication that defendant's default  
7 resulted from excusable neglect. Plaintiff communicated with defendant  
8 by mail on March 18, 2010 and May 7, 2010 requesting that defendant cease  
9 and desist infringing activity. Defendant was served on October 8, 2010  
10 at its principal place of business and its registered agent was  
11 personally served with plaintiff's summons and complaint on October 12,  
12 2010. Plaintiff provided written notice to Defendant of its intent to  
13 move for entry of default. Defendant had ample notice of plaintiff's  
14 intent to pursue judgment against it. Although public policy generally  
15 favors the resolution of a case on its merits, defendant's failure to  
16 appear and defend against plaintiff's claims has made a decision on the  
17 merits impossible in this case. Because all of these factors weigh in  
18 plaintiff's favor, the undersigned, while recognizing the public policy  
19 that favors decisions on the merits, will grant plaintiff's motion for  
20 default judgment against defendant on all of plaintiff's causes of  
21 action. Having determined that entry of default judgment is warranted,  
22 the court must next determine the terms of the judgment.

23           4. The Lanham Act provides for statutory damages for violations of  
24 §1125(d)(1). "[T]he plain language of the statute affords plaintiffs the  
25 right to pursue statutory damages without proving actual damages;  
26 however, the statute does not provide guidelines for courts to use in

determining an appropriate award." *Louis Vuitton Malletier & Oakley, Inc. v. Veit*, 211 F.Supp.2d 567, 583 (E.D.Pa.2002). The statute reads:

(d) Statutory damages for violation of section 1125(d)(1)

In a case involving a violation of section 1125(d)(1) of this title, the plaintiff may elect, at any time before final judgment is rendered by the trial court, to recover, instead of actual damages and profits, an award of statutory damages in the amount of not less than \$1,000 and not more than \$100,000 per domain name, as the court considers just.

15 U.S.C.A. § 1117(d).

5. Plaintiff, for purposes of this default judgment, is requesting statutory damages pursuant to 15 U.S.C. §1117(d).

6. Under the Lanham Act, the prevailing party may be awarded reasonable attorney fees "in exceptional cases." 15 U.S.C. § 1117(a). The statute does not define the term "exceptional cases," but the Ninth Circuit has held that "attorneys' fees are available in infringement cases where the acts of infringement can be characterized as malicious, fraudulent, deliberate, or willful." *Rio Properties, Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1023 (9th Cir.2002) (citing *Playboy Enters., Inc. v. Baccarat Clothing Co.*, 692 F.2d 1272, 1276 (9th Cir.1982)).

7. Plaintiff incurred attorneys' fees in the amount of \$26,486.00. See Declarations of Haggerty and Becker. Plaintiff is requesting costs incurred in this action, however, an amount has not been specified.

Based upon the foregoing, it is hereby **ORDERED, ADJUDGED, AND DECREED:**

1. Plaintiff Food Concepts International, L.P.'s Motion for Entry of Default Judgment against Defendant Mex, Inc. dba Abuelo's Fine Mexican Dining and its Agents, which was filed January 14, 2011, **Ct. Rec. 7**, is

1 **GRANTED.** Upon consideration of all of plaintiff's briefing, the  
2 undersigned will order that damages be awarded but not in the amount  
3 requested.

4 2. Plaintiff Food Concepts is awarded statutory damages of  
5 \$10,000.00 for Mex Inc.'s use of the domain name abuelosfinedining.com  
6 in violation of the Anticybersquatting Consumer Protection Act, 15 U.S.C.  
7 § 1125(d).

8 3. Plaintiff is awarded reasonable attorney's fees in the amount  
9 of Twenty-Six Thousand Four Hundred Eighty-Six Dollars (\$26,486.00) based  
10 on facts supporting an "exceptional case" under 15 U.S.C. § 1117(a).

11 4. The Registrar of the domain name abuelosfinedining.com, GoDaddy,  
12 Inc., with a principal place of business of 14455 N. Hayden Rd., Suite  
13 219, Scottsdale, AZ 85260, is hereby ordered to transfer ownership of the  
14 abuelosfinedining.com domain to Food Concepts.

15 5. Mex Inc. and its officers, directors, agents, employees,  
16 successors, assigns and attorneys, and all persons and entities in active  
17 concert or participation who receive notice of the injunction by personal  
18 service or otherwise, are hereby permanently enjoined and restrained from  
19 doing, aiding, causing, or abetting any of the following:

20 (a) advertising, promoting and/or offering restaurant services under  
21 the ABUELO'S trademark or any other commercial designation confusingly  
22 similar to a trademark or service mark owned by Food Concepts;

23 (b) doing any act or thing calculated or likely to cause confusion  
24 or mistake in the minds of members of the public or the trade as to the  
25 source of the restaurant services advertised or offered by Mex Inc. or  
26 likely to deceive members of the public or the trade into believing that

1 there is some connection between Mex Inc., including any business  
2 operations through any website connected to the domain name  
3 abuelosfinedining.com or any domain names that are identical or  
4 confusingly similar to Food Concepts' trademarks;

5 (c) re-registering the Domain Name or a domain name  
6 substantially or confusingly similar to the Domain Name, with a different  
7 registrar or in a different top level domain in the future; and

8 (d) directly or indirectly using in commerce a reproduction,  
9 counterfeit, copy, or colorable imitation of Food Concepts' registered  
10 marks in connection with the sale, offering for sale, distribution, or  
11 advertisement of any goods and/or services without authorization from  
12 Food Concepts, and including any business operations through any website  
13 connected to the domain name abuelosfinedining.com or any domain name  
14 that is identical or confusingly similar to Food Concepts' trademarks.

15 6. Food Concepts is hereby awarded post-judgment interest at the  
16 statutory rate on all sums awarded by this Court.

17 **IT IS SO ORDERED.** The District Court Executive is directed to:

18 (A) Enter this Judgment,

19 (B) Provide copies of this Judgment to counsel and Defendant, and

20 (C) **CLOSE THE FILE.**

21 **DATED** this 15th day of March, 2011.

22  
23 ***s/Lonny R. Suko***

24 \_\_\_\_\_  
LONNY R. SUKO  
UNITED STATES DISTRICT JUDGE